

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

August 26, 2009

Bernard A. Van Ogtrop, Esquire
222 Delaware Avenue
Wilmington, DE 19801

Anthony A. Figliola, Jr., Esquire
1813 Marsh Road, Suite A
Wilmington, DE 19810

RE: Edward Atwood v. Target Building Construction, Inc.
C.A. No. 06C-04-122 WCC

_____ On Plaintiff's Motion in Limine - GRANTED

Submitted: July 29, 2009
Decided: August 26, 2009

Dear Counsel:

The Plaintiff has filed a Motion in Limine and the Court heard oral argument on July 29, 2009. This is the Court's decision on that Motion.

The sole issue before the Court is whether collateral estoppel would prevent the Defendant from contesting in this tort action the decision of the Industrial Accident Board (IAB) that the injury to the Plaintiff's left shoulder was causally related to the work accident. The standard for the application of collateral estoppel is well established:

- I. The issue previously decided must be identical to the issue at bar;
- ii. The prior issue was finally adjudicated on its merits;
- iii. The party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and
- iv. The party against whom the doctrine is raised had a full and fair

opportunity to litigate the issue in the prior action.¹

Applying these standards to this case, the Court finds that the issue previously decided, whether the injury to the Plaintiff's left shoulder was related to the accident, is identical and that issue was fully presented to the IAB by the same doctors who are the retained experts in this case. The Court also finds there is privity between the employer in the IAB proceeding (Northwood) and the Defendant in this case as the Defendant is the general contractor on the work site on which the Plaintiff's employer was working. The employer's interest before the IAB to contest that the alleged injuries to the Plaintiff's left shoulder were not related to the accident are identical to the interests of the Defendant in defending this litigation. As such, the only issue remaining for the Court is whether the IAB proceeding provided the Defendant a full and fair opportunity to litigate the issue.

Under the facts of this case, the Court finds that it has. The expert doctors in the present case are the same doctors who testified before the IAB. There is nothing to suggest that the IAB proceeding somehow limited the medical examination of the Plaintiff or the opinions of these doctors relating to the Plaintiff's left shoulder. Nor is there even a suggestion that the doctors' opinions have been changed or been affected by the discovery that has been conducted during this litigation which has been ongoing for nearly three years. As such, this would be the classic case of the same limited issue being litigated twice with the same experts giving identical testimony. Neither *Messick v. State Enterprise*² or the *City of Newark v. Unemployment Insurance Appeal Board*³ cases cited by the parties would require that outcome.

The Court also finds that the *Messick* decision is limited to addressing the concern that an employee would be forced to elect the forum to litigate its damages in violation of 19 *Del. C.* § 2363(a). Such a forced election would undermine the intent of the workers' compensation legislation to allow for expeditious relief by the employee without the delay related to a civil law suit. That same concern is simply not present for an employer.

¹ *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A. 2d 318, 324 (Del. Super. 2002) (citing *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000)).

² 655 A.2d 1209 (Del. 1995).

³ 802 A.2d 318 (Del. Super. 2002).

Finally, the Court agrees that the differences between the workers' compensation proceeding and civil litigation in this Court would normally make it difficult to apply collateral estoppel to the decisions that have been made at the IAB proceeding. However, because of the uniqueness of the issue presented here with the same experts giving the same testimony, the Court believes that concern has been removed.

As a result of the above, the Court hereby grants the Plaintiff's Motion in Limine.

IT IS SO ORDERED.

Sincerely yours,

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Christy Magid, Case Manager